Supreme Court, U.S.
FILED
APR 10 1992
OFFICE OF THE CLERK

(2)

No. 91-1434

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JAMES H. POU BAILEY, *et al.*,
Petitioners,

V.

THE STATE OF NORTH CAROLINA, *et al.*,
Respondents.

Petition for A Writ of Certiorari to the Supreme Court of North Carolina

---

BRIEF IN OPPOSITION

LACY H. THORNBURG
Attorney General

Edwin M. Speas, Jr.
Senior Deputy Attorney General

Norma S. Harrell*
Special Deputy Attorney General

George W. Boylan
Special Deputy Attorney General

Thomas F. Moffitt
Special Deputy Attorney General

N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-3786
*Counsel of Record

22

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD NOT BE GRANTED 5

I. THE SUPREME COURT OF NORTH CAROLINA'S APPLICATION OF N.C. GEN. STAT. § 105-267 TO BAR PETITIONERS' CLAIMS ON PROCEDURAL GROUNDS SATISFIES DUE PROCESS REQUIREMENTS AS INTERPRETED BY THIS COURT IN *McKESSON v. FLORIDA DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO*, 496 U.S. 18 (1990) 5

II. THE SUPREME COURT OF NORTH CAROLINA'S APPLICATION OF N.C. GEN. STAT. § 105-267 TO BAR PETITIONERS' CLAIMS ON PROCEDURAL GROUNDS WAS CONSISTENT WITH THIS COURT'S RULING IN *FELDER v. CASEY*, 487 U.S. 131 (1988) 10

III. THE SUPREME COURT OF NORTH CAROLINA DID NOT DENY PETITIONERS MEANINGFUL ACCESS TO THE NORTH CAROLINA COURTS 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Bailey v. State of North Carolina,
330 N.C. 227, 412 S.E.2d 295 (1991) 9

California v. Grace Brethren Church,
457 U.S. 393 (1982) 12

Chevron Oil v. Huson, 404 U.S. 97 (1971) 6

Coca Cola Co. v. Coble, 293 N.C. 565,
238 S.E.2d 780 (1977) 7

Davis v. Michigan Department of Treasury,
489 U.S. 803 (1989) 1-3

Fair Assessment in Real Estate Association,
Inc. v. McNary, 454 U.S. 100 (1981) 13

Felder v. Casey, 487 U.S. 131 (1988) 10, 11,
13, 14

Franchise Tax Board of Calif. v.
Alcan Alum. Ltd., 493 U.S. 331 (1990) 11

Kirkpatrick v. Currie, 250 N.C. 214,
108 S.E.2d 209 (1959) 7

McKesson v. Florida Division of
Alcoholic Beverages and Tobacco,
496 U.S. 18 (1990) . . . . . *passim*

Rosewell v. LaSalle National Bank,
450 U.S. 503 (1981) 13

Swanson v. Powers, 89-282-CIV-5-H
(E.D.N.C. 1990), *rev'd in part*, 937
F.2d 965 (1991), *cert. denied*, 116
L.Ed.2d 777 (13 January 1992) 11

Swanson v. State of North Carolina,
329 N.C. 576, 407 S.E.2d 791, *reh.*
granted, 330 N.C. 445, 410 S.E.2d 498,
adhered to on reh., 330 N.C. 390,
410 S.E.2d 490 (1991) 2

United States v. Donnelly,
397 U.S. 286 (1970) 6

Statutes

28 U.S.C. § 1341 11

42 U.S.C. § 111 1

42 U.S.C. § 1983 . . . . . 5, 10-14

Ala. Code § 36-27-28 (Supp. 1988) 2

Ala. Code § 40-18-19 (Supp. 1988) 2

Ariz. Rev. Stat. Ann. § 43-1022
(Supp. 1988) 2

Ark. Code Ann. § 26-51-3026 2

Colo. Rev. Stat. § 39-22-104(4)(f) and (g) (Supp. 1988) 2

Ga. Code Ann. § 48-7-27(a)(4)(A) (Supp. 1988) 2

Iowa Code Ann. § 97A.12 (West 1984) 2

Kan. Stat. Ann. § 74-4923(b) (1985) 2

Ky. Rev. Stat. Ann. § 16.690 (Michie/Bobbs-Merrill Supp. 1988) 2

La. R.S. 42545, 47:44.1 (Supp. 1989) 2

Mich. Comp. Laws Ann. § 206.30 (1988) 2

Miss. Code Ann. § 21-29-51 (1972) 2

Miss. Code Ann. § 25-11-129 (1972) 2

Mo. Rev. Stat. § 86.190 (1986) 2

Mo. Rev. Stat. § 104.540 (1986) 2

Mont. Code Ann. § 15-30-111(2) (1987) 2

N.C. Gen. Stat. § 105-267 . . . . . *passim*

N.C. Gen. Stat. § 105-266.1 12

N.M. Stat. Ann. § 10-11-145 (1978) 2

N.M. Stat. Ann. § 22-11-42 (1978) 2

N.Y. Tax Law § 612(c)(3) (McKinney 1987) 2

Okla. Stat. § 68-2358 (1988) 2

Ore. Rev. Stat. § 316.680(1)(c) and (d) (1987) 2

S.C. Code § 12-7-435(a), (d), and (e) (Supp. 1988) 2

Utah Code Ann. § 49-1-608 (1989) 2

Va. Code § 58.1-322(C)(3) (Supp. 1988) 2

W.Va. Code § 11-21-12(c)(5) and (6) (Supp. 1988) 2

Wisc. Stat. § 71.05(1)(a) (Supp. 1988) 2

Session Laws

1989 N.C. Sess. Laws, ch. 792, s.1.1 3

THIS PAGE INTENTIONALLY LEFT BLANK

NO. 91-1434

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JAMES H. POU BAILEY, *et al.*,
Petitioners,

V.

THE STATE OF NORTH CAROLINA, *et al.*,
Respondents.

Petition for A Writ of Certiorari to the Supreme Court of North Carolina

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On March 28, 1989, this Court invalidated Michigan's laws which afforded more favorable income tax treatment to retired state employees' pensions than to retired federal employees' pensions. *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989). The majority found that this different tax treatment discriminated against federal retirees based solely on the federal source of their pensions in violation of the doctrine of intergovernmental tax immunity and the Public Salary Tax Act of 1939, 4 U.S.C. § 111.

When *Davis* was decided, North Carolina was one of twenty-three states with tax laws similar to the Michigan

statutes held unconstitutional in *Davis*.[1] North Carolina exempted from state income taxation all pension income of state employees and teachers, but exempted only $3,000 of federal employees' pension income.

Following the *Davis* decision, North Carolina equalized the tax treatment of state and federal pensions.[2] On

---

[1] *See* Ala. Code §§ 36-27-28 and 40-18-19 (Supp. 1988); Ariz. Rev. Stat. Ann. § 43-1022 (Supp. 1988); Ark. Code Ann. § 26-51-3026; Colo. Rev. Stat. § 39-22-104(4)(f) and (g) (Supp. 1988); Ga. Code Ann. § 48-7-27(a)(4)(A) (Supp. 1988); Iowa Code Ann. § 97A.12 (West 1984); Kan. Stat. Ann. § 74-4923(b) (1985); Ky. Rev. Stat. Ann. § 16.690 (Michie/Bobbs-Merrill Supp. 1988); La. R.S. 42545, 47:44.1 (Supp. 1989); Mich. Comp. Laws Ann. § 206.30 (1988); Miss. Code Ann. §§ 21-29-51 and 25-11-129 (1972); Mo. Rev. Stat. §§ 86.190 and 104.540 (1986); Mont. Code Ann. § 15-30-111(2) (1987); N.M. Stat. Ann. §§ 10-11-145 and 22-11-42 (1978); N.Y. Tax Law § 612(c)(3) (McKinney 1987); N.C.G.S. § 135-9 (1988); Okla. Stat. § 68-2358 (1988); Ore. Rev. Stat. § 316.680(1)(c) and (d) (1987); S.C. Code § 12-7-435(a), (d), and (e) (Supp. 1988); Utah Code Ann. § 49-1-608 (1989); Va. Code § 58.1-322(C)(3) (Supp. 1988); W.Va. Code § 11-21-12(c)(5) and (6) (Supp. 1988); and Wisc. Stat. § 71.05(1)(a) (Supp. 1988).

[2] Shortly after *Davis* was decided, federal retirees sued for refunds of taxes paid on their pensions in prior years. This claim was rejected on the ground that *Davis* applied prospectively only. *Swanson v. State of North Carolina*, 329 N.C. 576, 407 S.E.2d 791, *reh. granted*, 330 N.C. 445, 410 S.E.2d 498, *adhered to on reh.*, 330 N.C. 390, 410 S.E.2d 490 (1991). A petition for writ of certiorari to review that

August 18, 1989, the North Carolina General Assembly repealed the tax exemption for state retirement benefits and enacted a $4,000 exclusion for the retirement benefits of both state and federal employees, effective January 1, 1989. (1989 N.C. Sess. Laws, ch. 792, s.1.1).

Equalization of the tax treatment on state and federal pensions adversely impacted state retirees. Their pensions in excess of $4,000.00 were subjected to state income taxes for the first time.

On February 16, 1990, Petitioners, 228 state pensioners, on behalf of themselves and all others similarly situated, sued North Carolina (and various state officials) in state court claiming that repeal of the tax exemption on their state pensions violated the North Carolina and United States Constitutions. They sought refunds of taxes previously paid, a declaration that the exemption repeal statute was unconstitutional, and an injunction against its enforcement.[3]

---

decision is pending before this Court. *Swanson v. State of North Carolina*, No. 91-1436.

[3] The amount of the tax refunds sought, and the amount of potential revenue loss to the State, is roughly $50,000,000.00 per year. Ironically, holding the exemption repeal unconstitutional would reestablish disparate treatment of state and federal pension income and could expose the State to even greater financial liability as a consequence of *Davis*.

None of the Petitioners met mandatory conditions precedent under North Carolina law for refund actions against the State prior to filing their lawsuit. Under N.C. Gen. Stat. § 105-267, a taxpayer challenging the constitutionality of a tax must first pay the tax and make a written demand for a refund within 30 days after payment of the tax, and wait 90 days while the Secretary of Revenue evaluates the refund request. If the Secretary of Revenue fails to award the demanded refund, the taxpayer has three years after the expiration of the 90-day period to bring his action.

On October 15, 1990, Petitioners moved for summary judgment. North Carolina defended on the ground, *inter alia*, that Petitioners' claims were all barred because they failed to follow the mandatory provisions of N.C. Gen. Stat. § 105-267.[4] The trial court granted summary judgment to the Petitioners. On December 6, 1991, the Supreme Court of North Carolina reversed and remanded with directions to the trial court to enter summary judgment for the State based on Petitioners' failure to comply with N.C. Gen. Stat. § 105-267.

---

[4] Contrary to Petitioners' claim before this Court, *see* Petition, p. 8, the State asserted the bar of N.C. Gen. Stat. § 105-267 to all of Petitioners' claims both before the trial court and on appeal. The North Carolina Supreme Court clearly had jurisdiction to consider the barrier of N.C. Gen. Stat. § 105-267 on Petitioners' entire case.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

This is not a proper case for allowing Petitioners' request for a writ of certiorari. N.C. Gen. Stat. § 105-267 establishes notice and payment under protest procedures which must be met by a taxpayer challenging the constitutionality of a state tax statute. This statute fully comports with due process requirements established by this Court and does not erect unlawful procedural barriers to actions under 42 U.S.C. § 1983. Petitioners failed to comply with N.C. Gen. Stat. § 105-267's requirements prior to filing suit and the North Carolia Supreme Court correctly ordered the dismissal of Petitioners' suit. In short, Petitioners have not presented any grounds for this Court to accept this case for plenary review.

I. THE SUPREME COURT OF NORTH CAROLINA'S APPLICATION OF N.C. GEN. STAT. § 105-267 TO BAR PETITIONERS' CLAIMS ON PROCEDURAL GROUNDS SATISFIES DUE PROCESS REQUIREMENTS AS INTERPRETED BY THIS COURT IN *McKESSON v. FLORIDA DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO*, 496 U.S. 18 (1990).

Petitioners contend that they were denied due process because the Supreme Court of North Carolina applied N.C. Gen. Stat. § 105-267 to bar their claims on procedural grounds. According to Petitioners, N.C. Gen. Stat. § 105-

267 is an illusory remedy denying them an effective opportunity to challenge a tax upon constitutional grounds. This contention is meritless.

In *McKesson v. Florida Division Of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), this Court held that if states place taxpayers under duress promptly to pay a tax when due, the Due Process Clause of the Fourteenth Amendment requires states to provide taxpayers the opportunity for meaningful backward-looking relief that is clear and certain in order to rectify any unconstitutional deprivation.[5] To protect their financial stability and to enable sound fiscal planning, states may constitutionally impose statutory procedural requirements on actions for postdeprivation relief, such as making refunds available only to taxpayers paying the tax under protest, requiring timely notice of their constitutional challenge, and enforcing relatively short statutes of limitation. *McKesson*, 110 S.Ct. at 2254, 2257.

The provisions of N.C. Gen. Stat. § 105-267 accord full due process as articulated in *McKesson*. They merely require that a taxpayer challenging the constitutionality of a tax pay the tax and make written demand for a refund within 30 days after payment, and second, allow the Secretary of Revenue 90 days to consider his demand. If the Secretary denies the refund demand, the taxpayer may commence his

---

[5] Antecedent nonretroactivity and equitable principles may, of course, bar any backward-looking relief in the form of refunds. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *United States v. Donnelly*, 397 U.S. 286, 296 (1970).

action within three years after expiration of the 90-day period.

As *McKesson* requires, a taxpayer in North Carolina who challenges a tax as being unconstitutional is given the opportunity under N.C. Gen. Stat. § 105-267 to obtain a refund. This is a meaningful, clear and certain remedy which the State provides as long as the taxpayer meets several conditions precedent to suit. The conditions precedent are the same ones discussed with approval by this Court in *McKesson*: payment under timely protest (within thirty days of payment) and a relatively short statute of limitations (within three years after the Secretary of Revenue fails to grant a refund following the refund demand). Furthermore, when Petitioners filed their action, the procedural requirements of N.C. Gen. Stat. § 105-267 had been in place for decades and had been interpreted by the Supreme Court of North Carolina as the exclusive means by which taxpayers may obtain refunds of taxes paid pursuant to a statute challenged as unconstitutional. *Coca-Cola Co. v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977); *Kirkpatrick v. Currie*, 250 N.C. 214, 108 S.E.2d 209 (1959). Thus, Petitioners were clearly on notice when they commenced their lawsuit of the procedural requirements that must be met as a precondition to filing suit for refunds of taxes paid pursuant to a statute alleged to be unconstitutional.

Although state law afforded petitioners a clear and certain remedy for their claims, inexplicably they chose to disregard the requirements of the law. In derogation of N.C. Gen. Stat. § 105-267, they sued before requesting return of

any taxes paid on their pension incomes. Citing N.C. Gen. Stat. § 105-267, Petitioners first attempted to make a "class demand" two days after they filed suit, but still more than six weeks before their 1989 taxes were even due. Their demand contained only scanty information insufficient under state law to constitute an adequate refund request for any taxpayer. They disregarded N.C. Gen. Stat. § 105-267's logical and mandatory sequence of payment, timely 30-day demand and meaningful period for officials to consider the merits of a refund request, prior to filing suit. Having failed to comply (or even attempt to comply) with those requirements prior to filing suit, Petitioners may not now complain.

To avoid the consequence of their failure, Petitioners contend that the remedy provided by N.C. Gen. Stat. § 105-267 is hypertechnical and illusory on three grounds, all of which are equally without merit. First, they allege that the State could not administer the 30-day notice requirement because tax returns are not date-stamped by the Department of Revenue. (Petition, p. 12). Of course, there are other quite obvious means of ascertaining the timeliness of payment including a simple comparison of the date of a return as provided by the taxpayer with the date on his written protest. Further, in the event of disagreement about the timeliness, the courts are fully able to resolve such disagreements.

Second, Petitioners contend that the requirement that each taxpayer in a class action must meet the preconditions to suit deprived taxpayers of the ability to "share the cost of litigation by way of class action." (Petition, pp. 12-13). The

Supreme Court of North Carolina did not foreclose the possibility that class actions could be used in tax refund litigation. Instead, that Court stated the obvious -- only valid claims can be aggregated in class actions, and taxpayers who fail to meet the statutory preconditions to suit in N.C. Gen. Stat. § 105-267 do not present valid claims. *Bailey v. State of North Carolina*, 330 N.C. 227, 237, n.3, 412 S.E.2d 295, 301, n.3 (1991); (Petition, Appendix A, p. 12a).

Third, Petitioners acknowledge that this Court implicitly approved a three-year statute of limitations in *McKesson*, but assert that North Carolina's "30-day statute of limitations for demanding a refund is not reasonable." (Petition, p. 13). On this point, Petitioners are confusing the 30-day payment under timely protest requirement with the three-year statute of limitations. As this Court noted in *McKesson*, a state does not violate taxpayers' due process rights by enacting timely payment under protest provisions *and* relatively short statutes of limitations. North Carolina has chosen to do both, and both comport with the procedural due process requirements set forth in *McKesson*. Moreover, Petitioners in this case hardly have grounds to complain about the 30-day refund demand period. The statute repealing the exemption of their state pensions was enacted on August 18, 1989, eight months before Petitioners' 1989 taxes were due.

In sum, the Supreme Court of North Carolina's application of N.C. Gen. Stat. § 105-267 to bar Petitioners' claims on procedural grounds was consistent with due process of law. Petitioners' arguments on this point are

meritless, and their request for a writ of certiorari on this issue should be denied.

II. THE SUPREME COURT OF NORTH CAROLINA'S APPLICATION OF N.C. GEN. STAT. § 105-267 TO BAR PETITIONERS' CLAIMS ON PROCEDURAL GROUNDS WAS CONSISTENT WITH THIS COURT'S RULING IN *FELDER v. CASEY*, 487 U.S. 131 (1988).

Petitioners contend that the Supreme Court of North Carolina erred in holding that their federal constitutional claims brought under 42 U.S.C. § 1983 must be dismissed. They argue that they are entitled to proceed with those claims without complying with the procedural requirements of N.C. Gen. Stat. § 105-267 because of this Court's decision in *Felder v. Casey*, 487 U.S. 131 (1988). Petitioners are simply wrong in thinking that *Felder* has any application in this context.

Under Petitioners' theory, this Court's decision in *McKesson* would be meaningless whenever a state tax law or procedure is challenged as violative of the Constitution of the United States pursuant to 42 U.S.C. § 1983. *McKesson* relied on years of precedent in declaring that a state can require taxpayers to pay a tax before challenging its validity so long as it provides "meaningful backward-looking relief to rectify any unconstitutional deprivation." 110 S.Ct. at 2247. The state's vital interest in a stable and orderly tax-collection procedure underpinning its financial security justifies the long-established rule that a state need not provide

a predeprivation remedy for unconstitutionally-imposed taxes. *McKesson*, 110 S.Ct. at 2250. *McKesson's* promise of financial and fiscal stability would be hollow indeed if it had no application to tax challenges brought under 42 U.S.C. § 1983. Nothing in the Court's opinion suggests that *McKesson* and its predecessors offer such an illusory foundation for the state's financial stability.

Contrary to Petitioners' argument, *Felder* is simply not relevant to the North Carolina Supreme Court's conclusion that Petitioners were barred from bringing this action because of their failure to comply with N.C. Gen. Stat. § 105-267. As this Court is well aware, *Felder* concluded that a state could not impose a "notice of claim" statute as a prerequisite to bringing a § 1983 action in state court since the same action could be brought in federal court free of any such precondition. Petitioners ignore the reality that actions challenging state taxes as unconstitutional face the same barrier in federal court that the North Carolina Supreme Court and state law imposed on them in state court.

The Tax Injunction Act, 28 U.S.C. § 1341, bars actions in federal court to suspend or enjoin the collection of state taxes so long as the state provides a "plain, speedy, and efficient remedy" in its own courts. *E.g., Franchise Tax Board of Calif. v. Alcan Alum. Ltd.*, 493 U.S. 331 (1990).[6]

---

[6] Petitioners have cited to this Court the opinion of the United States District Court in *Swanson v. Powers*, 89-282-CIV-5-H (E.D.N.C. 1990), *rev'd in part*, 937 F.2d 965 (1991), *cert. denied*, 116 L.Ed.2d 777 (13 January 1992);

The "Act also prohibits a [federal] district court from issuing a declaratory judgment holding state tax laws unconstitutional." *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982). If the state provides a sufficient remedy, such as N.C. Gen. Stat. § 105-267, a dissatisfied taxpayer is required to exhaust his state remedies and is barred by the Tax Injunction Act from bringing an action under 42 U.S.C.

(Petition, Appendix J, pp. 92a-103a). The District Court there concluded that N.C. Gen. Stat. § 105-267 on its face provided a plain, speedy, and efficient remedy. However, it also held that the statutory remedy was inadequate for the *Swanson* plaintiffs primarily because of alleged uncertainty and purported confusion about the applicability of N.C. Gen. Stat. § 105-267 rather than N.C. Gen. Stat. § 105-266.1. As the opinion of the North Carolina Supreme Court below makes clear, both the relevant statutory provisions and clearly applicable case law make it obvious that § 105-267 was in fact the controlling statute. In addition, whatever confusion the *Swanson* plaintiffs may or may not have experienced, the Petitioners here claimed their refunds under N.C. Gen. Stat. § 105-267, not § 105-266.1 or any other tax law, through repeated letters to the Secretary of Revenue beginning on February 28, 1990, two days after their initial complaint was filed, and again on March 26, 1990, April 16, 1990, and April 26, 1990. (Petition, Appendix F, pp. 76a-83a). For Petitioners, at least, there clearly was no confusion or uncertainty as to which statute applied and what the statute of limitations was. Thus, what the District Court in *Swanson* recognized as a plain, speedy and efficient remedy on its face in fact stood available as a plain, speedy and efficient remedy in practice for Petitioners, had they chosen to follow it.

§ 1983 in federal court. *See Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). Indeed, even when the taxpayer sues state officials for damages under § 1983, "the principle of comity," and perhaps the Tax Injunction Act as well, prohibit the federal courts from entertaining the suit. The taxpayer must instead pursue his state remedies. *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 116 (1981).

When the Supreme Court of North Carolina required Petitioners to comply with the statutory procedures of N.C. Gen. Stat. § 105-267, it did not impose barriers to their § 1983 action in contravention of *Felder*. Instead, it imposed exactly the same limitations which must be imposed in federal district courts under the Tax Injunction Act, the principle of comity, and this Court's decisions. Petitioners' argument that the North Carolina Supreme Court violated this Court's ruling in *Felder* is baseless, and their application for writ of certiorari should be denied.

III. THE SUPREME COURT OF NORTH CAROLINA DID NOT DENY PETITIONERS MEANINGFUL ACCESS TO THE NORTH CAROLINA COURTS.

Petitioners contend that the Supreme Court of North Carolina denied them access to the state's courts in violation of their due process rights. This argument merely restates in a different form the same claims Petitioners made in their first two arguments. The procedures established by N.C. Gen. Stat. § 105-267 satisfy the due process standards set out

in *McKesson* and under the Tax Injunction Act, and this Court's decisions interpreting and applying that Act. The Petitioners had meaningful access to the state courts available through the procedures set out in N.C. Gen. Stat. § 105-267, but chose not to follow them. Clearly, the dismissal of Petitioners' claims for failure to comply with N.C. Gen. Stat. § 105-267 does not violate Petitioners' due process rights, and Petitioners' application for writ of certiorari should be denied.

CONCLUSION

The Supreme Court of North Carolina's application of N.C. Gen. Stat. § 105-267 to bar Petitioners' claims on procedural grounds was consistent with due process of law as interpreted by this Court in *McKesson* and did not erect procedural barriers to a 42 U.S.C. § 1983 action in violation of *Felder v. Casey*. This Court should deny Petitioners' request for a writ of certiorari.

Respectfully submitted, this the 8th day of April, 1992.

LACY H. THORNBURG
Attorney General

Edwin M. Speas, Jr.
Senior Deputy Attorney General

Norma S. Harrell*
Special Deputy Attorney General

George W. Boylan
Special Deputy Attorney General

Thomas F. Moffitt
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-3786

*Counsel of Record